

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THE LANDS COUNCIL, HELLS CANYON  
PRESERVATION COUNCIL, and LEAGUE  
OF WILDERNESS DEFENDERS -- BLUE  
MOUNTAINS BIODIVERSITY PROJECT,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant,

and

ASOTIN COUNTY, a political  
subdivision of the State of  
Washington, and AMERICAN FOREST  
RESOURCE COUNCIL,

Defendants/Intervenors

CV-12-619-FVS-1

**ORDER DENYING THE  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT AND  
GRANTING THE DEFENDANTS'  
MOTIONS FOR SUMMARY  
JUDGMENT**

**THIS MATTER** came before the Court on December 18, 2013, based upon the parties' cross motions for summary judgment. Sean T. Malone argued for the plaintiffs. Julia S. Thrower argued for the United States Forest Service. Scott W. Horngren argued for Asotin County and the American Forest Resource Council. For the reasons set forth below, the plaintiffs' motion is denied and the defendants' respective motions are granted.

**BACKGROUND**

The Blue Mountains are located in the northeast corner of the

1 State of Oregon and, to some extent, in the southeast corner of the  
2 State of Washington. The climate in the Blue Mountains is demanding.  
3 In order to survive, vegetation must be able to withstand hot, dry  
4 summers. One of the vegetation groups that exists within the Blue  
5 Mountains is the dry upland forest. At one time, the dry upland  
6 forest was dominated by large, old ponderosa pine trees.

7 Ponderosa pine trees were important in life and in death. After  
8 dying, some of them remained standing. A "standing dead tree" is a  
9 "snag." (Glossary to Final Environmental Impact Statement at 18 (AR-  
10 29364).) A large snag is one whose diameter at breast height ("DBH")  
11 is 20 inches or more. Large snags provide habitat for a number of  
12 species of birds. Some of the species -- woodpeckers, for example --  
13 are grouped together under the heading "primary cavity excavators."  
14 As the name suggests, "[p]rimary cavity excavators create holes for  
15 nesting or roosting in live, dead or decaying trees." (Final  
16 Environmental Impact Statement at 3-121 (AR-29268).)

17 Large, old ponderosa pine trees no longer dominate the dry upland  
18 forests. Their decline has been dramatic. Some of the decline is  
19 attributable to logging; some of it is attributable to fire  
20 suppression. In any event, conditions within the dry upland forest  
21 have changed. The changes have been detrimental to those species of  
22 birds that depended upon the conditions that once existed.

23 A significant part of the Blue Mountains is located within the  
24 Umatilla National Forest. The Umatilla National Forest is divided  
25 into ranger districts. One of them is the Pomeroy Ranger District.  
26 Within the Pomeroy Ranger District, there is a 21,000-acre area that

1 the United States Forest Service refers to as "the South George  
2 project planning area." Most of the planning area is situated within  
3 Asotin County, Washington.

4 Forests within the South George project planning area are  
5 declining in health. They have become susceptible to insects,  
6 disease, and fire. Forest fires are a sensitive subject in Asotin  
7 County. In 2005 and 2006, major fires occurred on land that is  
8 located just to the west of Asotin County. The fires were a painful  
9 reminder of the devastation that such phenomena cause. (Declaration  
10 of Brian Shinn (ECF No. 12) at 2.)

11 After studying the South George planning area, the Forest Service  
12 published a Draft Environmental Impact Statement for a proposed "South  
13 George Vegetation and Fuels Management Project." The Forest Service  
14 received comments from federal and state agencies, environmental  
15 organizations, members of the timber industry, and concerned citizens.  
16 During July of 2012, the Forest Service published a Final  
17 Environmental Impact Statement ("FEIS"), which analyzed a number of  
18 potential courses of action. On July 17, 2012, the Forest Service  
19 issued the "Record of Decision for the South George Vegetation and  
20 Fuels Management Project." Stated very broadly, the purpose of the  
21 Project is to use environmentally responsible silvicultural techniques  
22 in order to restore forests within the Project area to their  
23 historical range of variability.

24 The term "silviculture" is defined as "[t]he practice of  
25 manipulating the establishment, composition, structure, growth, and  
26 rate of succession of forests to accomplish specific objectives."

1 (Glossary at 17 (AR-29363).) Here, the Forest Service has decided to  
2 (1) harvest timber on approximately 3,900 acres of land, (2) remove  
3 trees that are likely to fall on roads, (3) burn approximately 3,000  
4 acres of land, and (4) thin approximately 25 acres of forest that is  
5 located within a Riparian Habitat Conservation Area. The purpose of  
6 those actions is to begin the process of restoring the forests in  
7 question to their historical range of variability ("HRV"). (See,  
8 e.g., FEIS at S-3, (AR-29060)). In the Final Environmental Impact  
9 Statement, the term HRV "refers to the range of conditions and  
10 processes that are likely to have occurred prior to settlement of the  
11 project area by people of European descent (approximately the mid  
12 1800s), which would have varied within certain limits over time."  
13 (Glossary at 11 (AR-29357).)

14 As noted above, one of the areas that will be affected by the  
15 Project lies within a Riparian Habitat Conservation Area. The  
16 definition of a "riparian area" is fairly concrete. A riparian area  
17 is simply "an area along a watercourse." *Id.* at 16 (AR-29362).) The  
18 definition of a Riparian Habitat Conservation Area ("RHCA") is fairly  
19 abstract. For purposes of the Final Environmental Impact Statement, a  
20 RHCA includes "[p]ortions of watershed where riparian-dependent  
21 resources receive emphasis, and management activities are subject to  
22 specific standards and guidelines." *Id.*

23 On December 10, 2012, three environmental organizations filed an  
24 action seeking to enjoin the Project. One of them is The Lands  
25 Council. A second is the Hells Canyon Preservation Council. A third  
26 is the League of Wilderness Defenders -- Blue Mountains Biodiversity

1 Project. They allege the Forest Service's decision to proceed with  
2 the Project violates both the National Forest Management Act, 16  
3 U.S.C. §§ 1600-1687, and the National Environmental Policy Act, 42  
4 U.S.C. §§ 4321-4370. As the plaintiffs acknowledge, neither the  
5 National Forest Management Act nor the National Environmental Policy  
6 Act provides a private cause of action. *See, e.g., Earth Island*  
7 *Institute v. United States Forest Service*, 697 F.3d 1010, 1013 (9th  
8 Cir.2012). Nevertheless, the plaintiffs may obtain judicial review of  
9 an agency decision under the Administrative Procedure Act, 5 U.S.C. §  
10 551-706. This Court has jurisdiction over the subject matter of the  
11 action pursuant to 28 U.S.C. § 1331.

12 On April 25, 2013, both Asotin County and the American Forest  
13 Resource Council received permission to intervene as defendants. As  
14 explained above, the proposed Project will take place on land that is  
15 located in Asotin County. The county commissioners argue that the  
16 proposed Project is necessary to prevent forest fires and that it will  
17 provide jobs for a sparsely populated county whose residents  
18 desperately need work. The American Forest Resource Council ("AFRC")  
19 is an organization that represents wood products companies throughout  
20 the western United States. Several companies that belong to the AFRC  
21 purchase timber. If the proposed Project is enjoined, says the AFRC,  
22 its member companies will lose an important source of timber.

23 The parties have filed cross motions for summary judgment. The  
24 Rule 56 standard is well established. "The court shall grant summary  
25 judgment if the movant shows that there is no genuine dispute as to  
26 any material fact and the movant is entitled to judgment as a matter

1 of law." Fed.R.Civ.P. 56(a). The moving parties agree about one  
2 thing: There is no genuine issue of material fact.

### 3 **STANDARD OF REVIEW**

4 The Court must set aside the Forest Service's decision to proceed  
5 with the South George Vegetation and Fuels Management Project if the  
6 decision was "arbitrary, capricious, an abuse of discretion, or  
7 otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A).  
8 However, review under the arbitrary and capricious standard is narrow.  
9 *Earth Island Institute*, 697 F.3d at 1014 (internal punctuation and  
10 citation omitted). The Ninth Circuit has explained:

11 "An agency action is arbitrary and capricious if the agency  
12 . . . relied on factors which Congress has not intended it  
13 to consider, entirely failed to consider an important aspect  
14 of the problem, offered an explanation for its decision that  
15 runs counter to the evidence before the agency, or is so  
16 implausible that it could not be ascribed to a difference in  
view or the product of agency expertise."

17 *See, e.g., Confederated Tribes of the Umatilla Indian Reservation v.*  
18 *BPA*, 342 F.3d 924, 928 (9th Cir.2003) (quoting *Motor Vehicle Mfrs.*  
19 *Ass'n v. State Farm*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443  
(1983) (hereinafter "*Confederated Tribes*").

### 20 **INTRODUCTION TO THE PLAINTIFFS' ALLEGATIONS**

#### 21 A. National Forest Management Act

22 The National Forest Management Act "provides both procedural and  
23 substantive requirements. Procedurally, it requires the Forest  
24 Service to develop and maintain forest resource management plans."  
25 *Ecology Center v. Castaneda*, 574 F.3d 652, 656 (9th Cir.2009)  
26 (citation omitted). A forest plan "is a broad, long-term planning

1 document for an administrative unit of the National Forest System. A  
2 forest plan establishes goals and objectives for management of forest  
3 resources." *Earth Island Institute*, 697 F.3d at 1014 (citing 16  
4 U.S.C. § 1604(g)(1)-(3)). In this case, the relevant forest plan is  
5 the Umatilla National Forest Land and Resources Management Plan.  
6 Hereinafter, it will be referred to as either "the Umatilla National  
7 Forest Plan" or, simply, "the Plan."

8 The Forest Service adopted the Plan in 1990. (Umatilla National  
9 Forest Plan at \_\_ (AR-5051).) A forest plan can be, and frequently  
10 is, amended by the Forest Service. The Umatilla National Forest Plan  
11 is no exception. It was amended twice during 1995.

12 The first of the two 1995 amendments was Forest Plan Amendment  
13 #10. (FEIS at 1-10, 1-11 (AR-29092, AR-29093).) It has a daunting  
14 title: "Decision Notice/Decision Record, Finding of No Significant  
15 Impact, Environmental Assessment, for the Interim Strategies for  
16 Managing Anadromous Fish-producing Watersheds in Eastern Oregon and  
17 Washington, Idaho, and Portions of California." (AR-9001.) The  
18 parties rarely use the formal title of Amendment #10. Instead, they  
19 typically refer to it as "PACFISH." (FEIS at 1-10, 1-11 (AR-29092,  
20 AR-29093).) This order generally follows the parties' practice.  
21 Hereafter, Amendment #10 will sometimes be referred to as the "Interim  
22 Strategies for Managing Anadromous Fish-producing Watersheds," and  
23 sometimes it will be referred to as "PACFISH." As will be explained  
24 in greater detail below, PACFISH provides "protection for fish  
25 habitat, particularly regarding activities within riparian areas."  
26 (*Id.* at 1-11 (AR-29093).)

1       The other amendment that occurred in 1995 is Amendment #11. It's  
2 title is equally daunting: "Decision Notice for the Revised  
3 Continuation of Interim Management Direction Establishing Riparian,  
4 Ecosystem and Wildlife Standards for Timber Sales." (AR-9486.) Once  
5 again, the parties rarely use the formal title of Amendment #11.  
6 Instead, they typically refer to it as the "Eastside Screens." (FEIS  
7 at 1-11 (AR-29093).) The Eastside Screens impose limits upon timber  
8 sales in the Umatilla National Forest.

9       The Forest Service is satisfied the South George Vegetation and  
10 Fuels Management Project is consistent with the Umatilla National  
11 Forest Plan. The plaintiffs disagree. They claim the Project is  
12 inconsistent with the Plan in two material respects. To begin with,  
13 they allege the Forest Service has failed to demonstrate the Project  
14 preserves enough snag habitat in dry upland forest in order to ensure  
15 the viability of primary cavity excavators. In addition, the  
16 plaintiffs allege the Forest Service has failed to demonstrate it is  
17 appropriate to remove trees from land that is located within a  
18 Riparian Habitat Conservation Area.

19       *1. Snag Habitat*

20       The Final Environmental Impact Statement includes an analysis of  
21 snag habitat. Snag habitat varies among vegetation groups. On  
22 average, there are more large snags per acre in moist upland forest  
23 (mixed conifer trees) than in dry upland forest (ponderosa pine  
24 trees). The Project area is no exception. On average, there are 3  
25 large snags per acre in moist upland forest and 1.1 large snags per  
26 acre in dry upland forest. (FEIS at 3-122, Table 3-69 (AR-29269)).



1 The plaintiffs are concerned about the lack of large snag habitat  
2 in dry upland forest. There are approximately 2,950 acres of dry  
3 upland forest in the Project area. Of those acres, 926 will be  
4 logged. (Logging will also take place in moist upland forest.) The  
5 Forest Service intends to retain three large snags per acre in those  
6 parts of the dry upland forest that are to be logged. (FEIS at 3-122  
7 (AR-29269)).

8 The plaintiffs question whether three large snags per acre is  
9 adequate to maintain the viability of primary cavity excavators in the  
10 Project area. Even if it is, the plaintiffs submit the Forest  
11 Services faces a problem. On average, there are only 1.1 large snags  
12 per acre in dry upland forest in the Project area. That being the  
13 case, say the plaintiffs, the Forest Service cannot accomplish its  
14 objective of retaining three large snags per acre. In the plaintiffs'  
15 opinion, this means there will not be enough large snag habitat to  
16 maintain the population of primary cavity excavators in dry upland  
17 forest.

## 18 *2. Tree Removal in Riparian Habitat Conservation Area*

19 George Creek flows through the Project area. An unnamed stream  
20 flows into George Creek. The Forest Service has decided to remove  
21 some trees from 25 acres of forest that lie along the unnamed  
22 tributary. The purpose of the tree removal is to reduce the risk of  
23 forest fire. The plaintiffs object to the tree removal. The 25 acres  
24 in question are located in a Riparian Habitat Conservation Area  
25 ("RHCA"). Removal of trees within a RHCA is governed by PACFISH. As  
26 will be recalled, the term "PACFISH" refers to one of the 1995

1 amendments to the Umatilla National Forest Plan. ("Interim Strategies  
2 for Managing Anadromous Fish-producing Watersheds," Appendix C, (AR-  
3 9001).) PACFISH establishes "Standards and Guidelines" for "Timber  
4 Management" in a RHCA. (*Id.* at C-910 (AR-9139).) The plaintiffs  
5 argue the proposed tree removal does not satisfy the relevant  
6 requirements.

7 B. National Environmental Policy Act

8 The Forest Service had a duty, under the National Environmental  
9 Policy Act, to take a "hard look" at the environmental consequences of  
10 the South George Vegetation and Fuels Management Project. *See Native*  
11 *Ecosystems Council v. United States Forest Service*, 428 F.3d 1233,  
12 1240 (9th Cir.2005). Among other things, the Forest Service completed  
13 an inventory of potential wilderness areas that exist within the  
14 Project area. As part of the process, the Forest Service had to  
15 identify the boundaries for potential wilderness areas. In order to  
16 make the identification of wilderness boundaries easier, the Forest  
17 Service decided to exclude from potential wilderness areas all land  
18 that is located within 300 feet of a road. The plaintiffs argue that,  
19 by imposing a 300-foot buffer along roads, the Forest Service  
20 arbitrarily excluded land from potential wilderness areas that is  
21 suitable for inclusion in them.

22 **1982 RULE**

23 One of the principal issues in this case is whether the South  
24 George Vegetation and Fuels Management Project is consistent with the  
25 Umatilla National Forest Plan. The plaintiffs say "No." The Forest  
26 Service and the defendant intervenors say "Yes." Why have they

1 reached different conclusions? In part, it is because they disagree  
2 with respect to what the Plan requires of the Forest Service.

3 The plaintiffs submit the Plan incorporates a set of regulations  
4 that have come to be known as "the 1982 rule." The Ninth Circuit  
5 summarized the 1982 rule in *Earth Island Institute v. United States*  
6 *Forest Service*:

7 Under NFMA, the Secretary [of Agriculture] was required to  
8 promulgate regulations that set out guidelines and standards  
9 to "provide for diversity of plant and animal communities  
10 based on the suitability and capability of the specific land  
11 area . . . ." 16 U.S.C. § 1604(g)(3)(B). Accordingly, in  
12 1982 the Forest Service issued planning regulations (known  
13 as the 1982 rule) to implement NFMA's viability  
14 requirements. The 1982 rule "require[d] the Forest Service  
15 to identify and monitor management indicator species ('MIS')  
16 and direct[ed] that 'fish and wildlife habitat shall be  
17 managed to maintain viable populations of existing native  
18 and desired non-native vertebrate species.'" [*Ecology*  
19 *Center v. Castaneda*, 574 F.3d 652, 657 (9th Cir.2009)]  
20 (quoting 47 Fed. Reg. 43,048 (Sept. 30, 1982)); **see also 36**  
21 **C.F.R. § 219.19 (1982)**.

22 *Earth Island Institute*, 697 F.3d at 1013-14 (emphasis added).<sup>1</sup> Does  
23 the 1982 rule apply in this case? The answer to that question depends  
24 upon whether the requirements of the 1982 rule were incorporated into  
25 the Umatilla National Forest Plan. See *id.*

26 It is appropriate, then, to turn to the text of the Plan. It is  
divided into chapters. Within Chapter 2, there is a section that is

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<sup>1</sup>The 1982 Rule was set forth in a prior version of 36 C.F.R.  
pt. 219. See, e.g., *Earth Island Institute v. Carlton*, 626 F.3d  
462, 476 (9th Cir.2010).

1 entitled "Wildlife." Within that section, there is a subsection that  
2 addresses "Indicator Species." And within that subsection, there is a  
3 citation to § 219.19 (*i.e.*, "the 1982 rule"):

4       Seven fish and wildlife indicator species were selected to  
5       represent animals associated with the major habitat types on  
6       the Forest. The habitat requirements of the selected  
7       indicator species are presumed to represent those of a  
8       larger group of wildlife species. Habitat conditions for  
9       management indicator species, as well as for all other  
10       wildlife species on the Forest, will be managed to maintain  
11       viable populations (**36 CFR 219.19**).

12 (Umatilla National Forest Plan at 2-9 (AR-5078).) (Emphasis added.)  
13 Not only does the Plan cite 36 C.F.R. § 219.19, say the plaintiffs,  
14 but also there are provisions in Chapter Four of the Plan that  
15 indicate the 1982 rule applies to the South George Vegetation and  
16 Fuels Management Project.

17       Chapter Four of the Umatilla National Forest Plan is entitled  
18 "Forest Management Direction." Chapter Four is divided into a number  
19 of sections. One of the sections in Chapter Four is entitled "Forest-  
20 Wide Standards and Guidelines." One of the subsections in "Forest-  
21 Wide Standards and Guidelines" addresses "Wildlife Habitat." And one  
22 of the subsections within "Wildlife Habitat" addresses "Dead and Down  
23 Tree Habitat." The plaintiffs place great weight upon the first  
24 sentence of paragraph 2, which is located on page 4-57. It states in  
25 part, "Unless specified in management area direction, as a minimum,  
26 provide the required numbers and sizes of hard snags throughout the  
Forest to maintain primary cavity excavators at 40 percent of their  
potential population throughout their present range." (Umatilla

1 National Forest Plan at 4-57 (AR-5171).)

2 The preceding quotation is located in a section of Chapter Four  
3 that is entitled "Forest-Wide Standards and Guidelines." The  
4 following section in Chapter Four is entitled "Management Areas." The  
5 "Introduction" to that section states in part, "Management Areas  
6 provide the multiple-use direction for managing specific areas of  
7 land." (*Id.* at 4-94 (AR-5208).) Table 4-23 lists 25 Management  
8 Areas. *Id.* As the plaintiffs point out, the South George Vegetation  
9 and Fuels Management Project provides that logging will take place in  
10 a number of Management Areas that are listed in Table 4-23. Affected  
11 areas include A6, C1, C3, C3A, C4, and C5. It is instructive to  
12 review the Plan's discussion of Management Area C3, which addresses  
13 "Big Game Winter Range." The Plan provides in part, "Dead and down  
14 tree habitat will be managed to provide or maintain 60 percent of the  
15 potential population level for all primary cavity excavators as  
16 described in Wildlife Habitats in Managed Forests (Thomas and others  
17 1979)." 4-153 (AR-5267).

18 As explained above, the Umatilla National Forest Plan was amended  
19 in 1995. The defendants concede Amendment # 11 (*i.e.*, the Eastside  
20 Screens) "directs the Forest Service to use [the] best available  
21 science to maintain snags and green replacement trees greater than 21  
22 inches diameter at breast height ('dbh') at 100 percent potential  
23 population levels of primary cavity excavators." (Memorandum in  
24 Response (ECF No. 31) at 9.) The plaintiffs seize upon the  
25 defendants' concession. The plaintiffs maintain, "[F]or those  
26 management areas within [the] South George Project, including A6, C1,

1 C3, C3A, C4, and C5 . . . , the South George Project must demonstrate  
2 that sufficient large snags are provided to maintain viable  
3 populations of primary cavity excavators in ponderosa pine habitat."  
4 (Combined Response-Reply to Federal Defendants' Combined Motion (ECF  
5 No. 34) at 4.)

6 We see, then, that the plaintiffs are relying upon provisions in  
7 both Chapter 2 and Chapter 4 of the Umatilla National Forest Plan. As  
8 they point out, the 1982 rule is cited in Chapter 2. Moreover,  
9 various sections in Chapter 4 emphasize the importance of retaining  
10 snag habitat in maintaining populations of primary cavity excavators.  
11 The plaintiffs argue that, when read together, the provisions from  
12 Chapters 2 and 4 indicate that the Plan incorporates the 1982 rule.

13 The Forest Service seems to concede the Plan incorporates the  
14 1982 rule at the planning level. However, the fact a forest plan  
15 incorporates the 1982 rule at the planning level does not mean the  
16 Forest Service must demonstrate a site-specific project complies with  
17 the 1982 rule's viability requirements. See *Earth Island Institute*,  
18 697 F.3d at 1014 n.1. In *Earth Island Institute*, for example, the  
19 Ninth Circuit ruled a forest plan incorporated certain elements of the  
20 1982 rule, but only at the planning level, not at the project level.  
21 *Id.* at 1014. That is the position of the Forest Service in this case.

22 The Forest Service also relies upon the text of the 1982 rule.  
23 One section provides in pertinent part, "that '[f]ish and wildlife  
24 habitat shall be managed to maintain viable populations of existing .  
25 . . species in the planning area.'" *Earth Island Institute*, 697 F.3d  
26 at 1015 (quoting 36 C.F.R. § 219.19 (1982)). It is important to

1 observe, says the Forest Service, that the 1982 rule does not state  
2 that wildlife habitat shall be managed in such a manner so as to  
3 maintain viable populations of existing species in the project area.  
4 Rather, in those instances in which it has been incorporated into a  
5 forest plan, the 1982 rule imposes a viability requirement with  
6 respect to "the planning area." The term "planning area" is defined  
7 by a separate section. The term means "[t]he area of the National  
8 Forest System covered by a regional guide or forest plan.'" *Utah*  
9 *Environmental Congress v. Bosworth*, 439 F.3d 1184, 1190 (10th  
10 Cir.2006) (quoting 36 C.F.R. 219.3). Thus, according to the Forest  
11 Service, the 1982 viability requirement applies to forest-wide plans,  
12 not to site-specific projects.

13 The Forest Service argues its interpretation of the Plan is  
14 supported by the Plan's text. Like the plaintiffs, the Forest Service  
15 quotes from the subsection concerning "Dead and Down Tree Habitat."  
16 As observed above, paragraph 2 states in part, "Unless specified in  
17 management area direction, as a minimum, provide the required numbers  
18 and sizes of hard snags **throughout the Forest** to maintain primary  
19 cavity excavators at 40 percent of their potential population  
20 **throughout their present range.**" The Forest Service places great  
21 weight upon the highlighted language in the preceding provision. One  
22 phrase refers to "hard snags throughout the Forest." Another requires  
23 the Forest Service to maintain primary cavity excavators throughout 40  
24 percent of "their present range." In the opinion of the Forest  
25 Service, those phrases indicate the provision applies at the planning  
26 level, not the project level.

1 Having set forth the parties' competing interpretations of the  
2 Plan, the Court must determine which of the two is the more  
3 persuasive. The plaintiffs' interpretation is supported by the fact  
4 the Plan cites 36 C.F.R. § 219.19. Given the citation, it seems  
5 reasonable to conclude the drafters of the Plan intended to draw upon  
6 the 1982 rule to some extent. But to what extent? The plaintiffs  
7 argue the Plan incorporates the 1982 rule at the project level. They  
8 cite provisions in Chapters 2 and 4 of the plan. Admittedly, the  
9 provisions cited by the plaintiffs contain mandatory language. Does  
10 that mean they should be read as binding agency regulations? Not  
11 necessarily. "The presence of a few, isolated provision cast in  
12 mandatory language does not transform an otherwise suggestive set of  
13 guidelines into binding agency regulations." *Castaneda*, 574 F.3d at  
14 660 (internal punctuation and citation omitted). More is required.  
15 In order to demonstrate the Plan incorporates the 1982 viability  
16 requirements at the project level, the plaintiffs must be able to  
17 identify clear language to that effect. *See, e.g., Earth Island*  
18 *Institute*, 697 F.3d at 1014 ("In [*Earth Island Institute v. Carlton*,  
19 626 F.3d 462 (9th Cir.2010)], . . . we determined that a forest plan .  
20 . . did not 'clearly' incorporate the [1982] viability requirements,  
21 because it did not 'contain[ ] specific provisions regarding wildlife  
22 viability.'" ). The plaintiffs have not done so. Not one of the  
23 passages they cite expressly requires the Forest Service to comply  
24 with the 1982 rule at the project level. Indeed, many of the passages  
25 seem to contemplate forest-wide policies. At most, the plaintiffs have  
26 demonstrated the Plan is ambiguous with respect to whether the 1982



rule is incorporated at the planning level or the project level. Assuming some ambiguity exists, who is best qualified to determine what the plan means? The Ninth Circuit has answered that question. A reviewing court should defer to the Forest Service's interpretation of a forest plan unless its interpretation is plainly inconsistent with the plan's terms. *See Earth Island Institute*, 697 F.3d at 1013 (internal punctuation and citation omitted). No clear inconsistency exists in this case. Consequently, the Forest Service's interpretation controls. The Plan does not incorporate the 1982 rule at the project level. It follows that the Forest Service is not obligated to demonstrate the Project retains enough large snag habitat in dry upland forest in the project area in order to maintain the viability of primary cavity excavators. Rather, the Forest Service must demonstrate enough snag habitat exists across the Umatilla National Forest as a whole in order to maintain the viability of primary cavity excavators.

#### **SNAG HABITAT**

The plaintiffs submit the Project fails to maintain adequate habitat for primary cavity excavators in dry upland forests. The plaintiffs begin with the text of the Umatilla National Forest Plan. As they read it, the Forest Service must preserve enough habitat to ensure 100 percent population levels of primary cavity excavators. Next, the plaintiffs turn to the Final Environmental Impact Statement. The Forest Service has determined that, on average, it is necessary to retain three large snags per acre in dry upland forest. However, there are only 1.1 large snags per acre, on average, in the dry

1 forests that are located within the project area, and there are only  
2 2.02 large snags per acre, on average, in the dry upland forests  
3 across the Umatilla National Forest as a whole. Since there are fewer  
4 than 3 large snags per acre in dry upland forests in either the  
5 project area or across the forest as a whole, the plaintiffs argue the  
6 Forest Service cannot fulfill its obligation to preserve enough  
7 habitat for primary cavity excavators.

8 The defendants submit the plaintiffs have misinterpreted the  
9 FEIS. As the defendants point out, the entire Project affects 3,900  
10 acres of land, which is less than one percent of the forested land  
11 that is located within the Umatilla National Forest. Within dry  
12 upland forest, commercial logging will take place on 926 acres of  
13 land. In the near term, logging likely will result in fewer large  
14 snags on those 926 acres. That is a matter of concern. However, the  
15 fact "a proposed project involves some disturbance to the forest does  
16 not prohibit the Forest Service from assuming that maintaining a  
17 sufficient amount of suitable habitat will maintain a species'  
18 viability.'" *Castenada*, 574 F.3d at 663 (quoting *Lands Council v.*  
19 *McNair*, 537 F.3d 981, 997 (9th Cir.2008) (en banc)). As the  
20 defendants observe, any diminution of snag habitat on the 926 acres in  
21 question will be offset by the presence of snag habitat across the  
22 forest as a whole. The FEIS states, "Forest wide, snag densities are  
23 similar to reference values (Mason and Countryman 2010). This would  
24 indicate that overall available snag habitat is contributing to viable  
25 populations of primary cavity excavators." 3-121 (AR-29268).  
26 Finally, the Forest Service insists it is taking steps to preserve

adequate snag habitat. They include:

- studying the manner in which snags are forming in the forest;
- leaving dense stands of trees in certain locations;
- retaining existing snags where possible;
- leaving large diameter trees in place;
- leaving at least 16 trees per acre;
- leaving smaller diameter snags; and
- refraining from piling slash against snags when burning land in order to protect existing snags.

(Memorandum in Reply (ECF No. 36) at 8-9.)

Given the record as a whole, the plaintiffs' allegation of inadequate snag habitat is unjustified. Forests within the Project area are unhealthy. Remedial action is appropriate. The Forest Service has established a legitimate goal: Restore unhealthy forests to conditions that existed before settlers began arriving during the middle of the nineteenth century. The Forest Service is aware the process of restoration will affect snag habitat. The Forest Service has designed the Project in a manner that, in the opinion of the Forest Service, will limit the disruption. Beyond that, the Forest Service has assessed the amount of dry-forest snag habitat that exists in the Project area and across the Umatilla National Forest as a whole. The data compiled by the Forest Service indicates adequate snag habitat exists to maintain the population of primary cavity excavators. The plaintiffs have failed to demonstrate that the Forest Service's assessment of the data is unreasonable.

#### **TREE REMOVAL IN RIPARIAN HABITAT CONSERVATION AREA**

The Forest Service is proposing to remove a certain number of

1 trees from 25 acres of forest that is located in a Riparian Habitat  
2 Conservation Area. Special procedures will be used to remove the  
3 trees. (FEIS at 2-17 (AR-29116).) Tree removal is governed by  
4 provisions that, as explained above, are now commonly referred to as  
5 "PACFISH." The PACFISH provisions were added to the Umatilla National  
6 Forest Plan in 1995 via Amendment #10. Their function is to protect  
7 runs of anadromous fish. "Anadromous fish" are "[f]ish that hatch in  
8 fresh water, migrate to the ocean, mature there, and return to fresh  
9 water to reproduce[.]" (Glossary at 2 (AR-29348).) Salmon and  
10 steelhead are familiar examples of anadromous fish.

11 The Forest Service interprets the Umatilla National Forest Plan  
12 as authorizing removal of trees from a RHCA as long as removal  
13 satisfies the requirements of the relevant PACFISH standard.  
14 Different types of activities are governed by different standards.  
15 For example, there are separate standards for timber harvest, road  
16 design, grazing, recreation, and forest fire prevention. ("Interim  
17 Strategies for Managing Anadromous Fish-producing Watersheds,"  
18 Appendix C, at C-10 to C-18 (AR-9139 to AR-9146).) The plaintiffs  
19 argue the proposed tree removal is a type of timber management and,  
20 thus, is governed by a timber management standard, viz., TM-1. (*Id.*  
21 at C-10 (AR-9139).) If so, the Forest Service must demonstrate  
22 removal is consistent with either subsection (a) or subsection (b) of  
23 TM-1:

- 24 a. Where catastrophic events such as fire, flooding,  
25 volcanic, wind, or insect damage result in degraded riparian  
26 conditions, allow salvage and fuelwood cutting in Riparian  
Habitat Conservation Areas only where present and future

1 woody debris needs are met, where cutting would not retard  
2 or prevent attainment of other Riparian Management  
3 Objectives, and where adverse effects on listed anadromous  
4 fish can be avoided. For watersheds with listed salmon or  
5 designated critical habitat, complete Watershed Analysis  
prior to salvage cutting in RHCAs.

6 b. Apply silvicultural practices for Riparian Habitat  
7 Conservation Areas to acquire desired vegetation  
8 characteristics where needed to attain Riparian Management  
9 Objectives. Apply silvicultural practices in a manner that  
does not retard attainment of Riparian Management Objectives  
and that avoids adverse effects on listed anadromous fish.

10 *Id.* The plaintiffs have analyzed the tree removal that the Forest  
11 Service is proposing. According to them, the proposed removal does  
12 not satisfy the requirements of either subsection "a" or "b."  
13 Consequently, they insist removal is prohibited by PACFISH.

14 The defendants argue TM-1 is inapplicable because the purpose of  
15 the tree removal is not timber management. Rather, as the defendants  
16 see it, the trees are being removed in order to reduce the risk of a  
17 crown fire occurring along the stream. (A crown fire is a fire that  
18 spreads across the tops of trees.) In the defendants' opinion, the  
19 relevant PACFISH standard is FM-1, which governs "Fire/Fuels  
20 Management." FM-1 states:

21 Design fuel treatment and fire suppression strategies,  
22 practices, and actions so as not to prevent attainment of  
23 Riparian Management Objectives, and to minimize disturbance  
24 of riparian ground cover and vegetation. Strategies should  
25 recognize the role of fire in ecosystem function and  
26 identify those instances where fire suppression or fuel  
management actions could perpetuate or be damaging to long-  
term ecosystem function, listed anadromous fish, or

1 designated critical habitat.

2 ("Interim Strategies for Managing Anadromous Fish-producing  
3 Watersheds," Appendix C, at C-15 (AR-9144).)

4 The plaintiffs allege FM-1 played no meaningful part in the  
5 Forest Service's decision to remove trees from the RHCA. Had FM-1  
6 played a meaningful part, say the plaintiffs, it would have been cited  
7 in the Final Environmental Impact Statement; but it was not cited  
8 therein, a point the defendants concede. According to the plaintiffs,  
9 the clearest explanation of the basis of the Forest Service's decision  
10 to remove trees from the RHCA is contained in "Appendix C" to the  
11 FEIS. Appendix C addresses whether the Project is consistent with the  
12 Eastside Screens. As will be recalled, the term "Eastside Screens"  
13 refers to provisions that were added to the Umatilla National Forest  
14 Plan via Amendment #11. Appendix C states, in part, that the removal  
15 of trees from a RHCA is consistent with the Eastside Screens as long  
16 as removal satisfies the provisions of PACFISH. (FEIS, Appendix C, at  
17 C-3 (AR-29448).) As a general rule, there are only two situations in  
18 which the Forest Service may authorize timber harvest activities in a  
19 RHCA:

20 1. For catastrophic events such as fire, flooding, volcanic,  
21 wind or insect damage (when salvage harvest and fuelwood  
22 cutting is then allowed if compatible with riparian  
management objectives); and

23 2. When applying silvicultural practices to control  
24 stocking, reestablish and culture stands, and acquire  
25 desired vegetation characteristics in a manner that also  
meets riparian management objectives.

26 (FEIS, Appendix C, at C-3 (AR-29448).) The Forest Service considered

1 the extent to which the Project's proposed silvicultural actions would  
2 affect RHCAs. The Forest Service made the following finding in that  
3 regard:

4 . . . None of the silvicultural proposed actions  
5 (intermediate cutting, regeneration cutting, planting) will  
6 occur in any of the riparian habitat conservation areas  
7 established by PACFISH (FP amendment # 10). *Special*  
8 *Exception:* one specific RHCA location (Red Hill portion of  
9 the project area) comprising 24 acres is proposed for  
10 treatment (improvement cutting, noncommercial thinning,  
11 prescribed fire) as a case study or prototype to examine  
whether limited RHCA treatments are warranted or advisable  
in the future (Hanger 2009).

12 *Id.* The plaintiffs argue the above-quoted passage undermines the  
13 defendants' present reliance upon FM-1. In the plaintiffs' opinion,  
14 the Forest Service recognized the applicability of TM-1 when it  
15 prepared the FEIS. Nevertheless, as the plaintiffs' view the record,  
16 the Forest Service decided it could unilaterally set aside the  
17 requirements of TM-1 in order to conduct a "case study" which would  
18 allow it to determine whether certain types of remedial action would  
19 be beneficial. The plaintiffs concede such a case study could be  
20 helpful. However, they deny the Forest Service has authority to  
21 unilaterally set aside the requirements of TM-1 in order to conduct  
22 such a study. In their opinion, the Forest Service must follow  
23 established procedure. If the Forest Service wants to modify the  
24 requirements of TM-1, say the plaintiffs, it must pursue an amendment  
25 of the Plan that authorizes it to conduct the study in question.

26 It is true, as the plaintiffs allege and the defendants concede,

1 that the FEIS does not cite RHCA standard FM-1 by name. However,  
2 nothing in the FEIS suggests trees will be removed from the RHCA as  
3 part of a timber management program. To the contrary, a balanced  
4 reading of the FEIS indicates the purpose of tree removal is to reduce  
5 the risk of fire. The following statement in the FEIS is  
6 illustrative:

7 No harvest will take place in RHCAs which are described  
8 below as they apply to this project except for two fuels  
9 treatments areas in RHCAs identified as RHCA units 1 and 2.  
10 Mechanical thinning will be used on approximately 25 acres  
11 to remove co-dominant conifers to reduce probability of  
crown fire initiation.

12 (FEIS at 2-19 (AR-29118).) Looking at the FEIS as a whole, the Forest  
13 Service's perspective is reasonably clear. The Forest Service never  
14 intended to remove trees from the RHCA as part of a timber management  
15 program. To the contrary, the Forest decided to remove the trees as a  
16 form of Fire/Fuels Management. This accurately characterizes the  
17 Forest Service's position even though the Forest Service did not cite  
18 FM-1 in the FEIS. Thus, contrary to the plaintiffs, the Forest  
19 Service's reliance upon FM-1 at this juncture in the proceedings does  
20 not constitute an after-the-fact attempt to shore up its decision by  
21 invoking a new rationale.

22 The Forest Service maintains it has authority under the Umatilla  
23 National Forest Plan to remove trees from a RHCA; provided, of course,  
24 the project is consistent with the provisions of the relevant PACFISH  
25 standard. The plaintiffs deny that FM-1 is the relevant standard and  
26 that the Forest Service relied upon FM-1 in designing the Project, but



1 they concede the Forest Service is authorized to remove trees from a  
2 RHCA without violating the Umatilla National Forest Plan as long as  
3 the Forest Service complies with the relevant PACFISH standard. As  
4 explained above, the Forest Service's decision to remove trees from  
5 the RHCA is not an aspect of timber management. Rather, it is part of  
6 an effort to reduce the risk of a crown fire along a stream in the  
7 RHCA. Consequently, FM-1 is the PACFISH standard the Forest Service  
8 must satisfy.

9 The first sentence of FM-1 states, "Design fuel treatment and  
10 fire suppression strategies, practices, and actions **so as not to**  
11 **prevent attainment of Riparian Management Objectives**, and to minimize  
12 disturbance of riparian ground cover and vegetation." ("Interim  
13 Strategies for Managing Anadromous Fish-producing Watersheds,"  
14 Appendix C, at C-15 (AR-9144).) (Emphasis added.) The FEIS defines  
15 the term "Riparian Management Objectives." They are "[q]uantifiable  
16 measures of stream and stream-side conditions that define good  
17 anadromous fish habitat, and serve as indicators against which  
18 attainment, or progress toward attainment, of the goals will be  
19 measured." (Glossary at 16 (AR-29362).) PACFISH establishes Riparian  
20 Management Objectives ("RMOs") for streams in a Riparian Habitat  
21 Conservation Area. The RMOs address critical attributes of a typical  
22 stream, viz., pool frequency, water temperatures, large woody debris,  
23 bank stability, lower bank angle, and width/depth ratio. ("Interim  
24 Strategies for Managing Anadromous Fish-producing Watersheds,"  
25 Appendix C, at C-6 (AR-9135).)

26 The plaintiffs are concerned about the temperature of water in

1 George Creek. They allege that removing trees from the area that  
2 borders the unnamed tributary of George Creek will reduce shade and  
3 that this will, in turn, increase the water temperature of the  
4 tributary. The plaintiffs fear the tributary will feed warmer water  
5 into George Creek, thereby increasing the temperature of George Creek  
6 to the detriment of anadromous fish. This is a serious concern, one  
7 the Forest Service has considered. (FEIS at 3-21, 3-22 (AR-29168, AR-  
8 29169)). The Forest Service is taking steps to limit the risk of a  
9 temperature increase in the tributary. For example, aquatic  
10 specialists will be present when trees are marked for removal.  
11 Overstory trees will be protected, and bank-and-channel stabilizing  
12 trees will remain uncut. (*Id.* at 2-19, Table 2-5 (AR-29118)).  
13 Furthermore, the Forest Service has assessed the risk that warmer  
14 water will flow into George Creek from the tributary and affect  
15 anadromous fish. As the Forest Service notes, a "[d]ry channel and  
16 subterranean flows occur between the project site and steelhead  
17 habitat." (FEIS, Appendix K, at K-213 (AR-29771).) This circumstance  
18 may limit the risk that warm water will flow into George Creek. There  
19 is at least one other mitigating circumstance. The period of greatest  
20 risk will occur during the middle of summer when the sun beats down on  
21 the area. However, during the middle of the summer, water from the  
22 tributary makes up about one quarter of the flow of George Creek at  
23 the confluence of the two streams. (FEIS at 3-22 (AR-29169).) Given  
24 the totality of the circumstances, the Forest Service determined "it  
25 is unlikely that there would be a measurable water temperature  
26 increase in George Creek from the RHCA fuels treatment[.]" *Id.*

1       The plaintiffs are not so sanguine. It will be many years, they  
2 note, before trees along the unnamed tributary grow to the point they  
3 provide as much shade as existing trees currently provide. In the  
4 meantime, the temperature of the water in the unnamed tributary can be  
5 expected to increase. How much will the water warm, and will warmer  
6 water enter George Creek? The plaintiffs are concerned. As they  
7 point out, the temperature of George Creek already is above the  
8 Riparian Management Objective for water temperature. Even a small  
9 increase in temperature will impede the attainment of the relevant RMO  
10 for George Creek. This may not constitute an egregious violation of  
11 PACFISH, but, according to the plaintiffs, there is no exception for  
12 de minimis violations. *Cf. Oregon Natural Resources Council Fund v.*  
13 *Goodman*, 505 F.3d 884, 895 (9th Cir.2007) ("Whether the acreage at  
14 issue is relatively large or small is irrelevant to this  
15 inquiry-relevant law contains no de minimis exceptions.").

16       The plaintiffs' concerns about water temperature are not  
17 frivolous. They reflect a careful review of the scientific data that  
18 the Forest Service has accumulated. However, the plaintiffs are not  
19 the only ones who are paying attention to water temperature. The  
20 Forest Service is equally attentive. For example, the Forest Service  
21 is aware that removing trees along the tributary will reduce shade and  
22 potentially increase the temperature of the tributary. The Forest  
23 Service has taken steps to limit the risk. Similarly, the Forest  
24 Service is aware that the tributary flows into George Creek. The  
25 Forest Service has assessed the risk that warmer water will flow from  
26 the tributary into George Creek. As explained above, the Forest

1 Service cites several circumstances that, in its opinion, limit the  
2 risk.

3 Both the plaintiffs and the Forest Service want to attain the  
4 Riparian Management Objectives for George Creek. However, they  
5 disagree as to the best method for doing so. The Forest Service has  
6 concluded that removing trees from the RHCA is necessary. In reaching  
7 that conclusion, the Forest Service engaged in a thoughtful analysis  
8 of a substantial body of scientific data. The analysis required a  
9 high level of technical expertise. Where "analysis of scientific data  
10 requires a high level of technical expertise, courts must defer to the  
11 informed discretion of the responsible federal agencies." *Earth*  
12 *Island Institute*, 697 F.3d at 1020 (internal punctuation and citation  
13 omitted). Deference is especially warranted in this situation because  
14 there is no risk-free path forward. While it is true that removing  
15 trees could increase water temperatures and possibly damage anadromous  
16 fish, it is also true that leaving the area as it is would increase  
17 the risk of a crown fire spreading through the tops of trees that are  
18 located along the tributary. The Forest Service is entitled to  
19 consider the costs associated with forest fire in determining whether  
20 the risks associated with tree removal are warranted. The Forest  
21 Service decided the balance of risks weighs in favor of tree removal;  
22 that, in the long run, removing trees is more likely to attain RMOs  
23 than leaving the area as it is. Reasonable people can disagree with  
24 the Forest Service's decision. However, that does not mean the Forest  
25 Service violated the law. To the contrary, the record reflects the  
26 Forest Service has developed a common sense solution to a complex

1 problem. The Forest Service's solution is not risk free, but, then  
2 again, neither are the alternatives.

### 3 **POTENTIAL WILDERNESS AREAS**

4 The plaintiffs concede the Forest Service considered the  
5 existence of potential wilderness areas in assessing the environmental  
6 consequences of the proposed Project. Nevertheless, the plaintiffs  
7 allege the Forest Service violated the National Environmental Policy  
8 Act by arbitrarily refusing to include any land that is located within  
9 300 feet of a road. (FEIS, Appendix H, at H-3 (AR-29499).) The  
10 Forest Service made that decision because some areas within 300 feet  
11 of a road show signs of logging, e.g., stumps or skid trails or clear  
12 cuts. The Forest Service decided such areas are not suitable for  
13 inclusion in wilderness areas. See *id.* The plaintiffs acknowledge  
14 that some areas within 300 feet of a road do show signs of logging.  
15 Nevertheless, there are large swaths of steppe-shrublands along roads  
16 that do not show such signs. By refusing to include any land that is  
17 located within 300 feet of a road, say the plaintiffs, the Forest  
18 Service arbitrarily failed to consider an important part of the  
19 problem of wilderness preservation.

20 The defendants deny the Forest Service arbitrarily ignored  
21 steppe-shrublands. As they point out, Appendix H to the Final  
22 Environmental Impact Statement sets forth the methodology that the  
23 Forest Service employed in analyzing potential wilderness area.  
24 (FEIS, Appendix H, at H-1 to H-10 (AR-29497 to AR-29506).) The Forest  
25 Service used the procedures that are contained in the Forest Service  
26 Handbook ("FSH"). (FEIS, Appendix H, at H-1 (AR-29497).) The FSH

1 says that, in establishing boundaries for potential wilderness, it is  
2 appropriate to "use semi-permanent human-made features that are  
3 locatable on the map and on the ground." (*Id.* at H-4 (AR-29500)  
4 (citing FSH 1909.12, at 71).) A road is one such feature.  
5 Consequently, in the defendants' opinion, the Forest Service did not  
6 act arbitrarily in drawing a boundary that parallels existing roads.  
7 Nor, in the defendants' opinion, did the Forest Service act  
8 arbitrarily in excluding all land within 300 feet of existing roads  
9 whether or not the land shows signs of logging. The Forest Service  
10 expressly recognized that "stumps are not present along every mile of  
11 forest road[.]" (FEIS, Appendix H, at H-3 (AR-29499).) Nevertheless,  
12 the Forest Service chose a 300-foot buffer because, in its judgment,  
13 the buffer would make it easier to identify potential wilderness  
14 areas.

15 The plaintiffs do not think the Forest Service needed to use an  
16 arbitrary 300-foot buffer in order to exclude land that shows signs of  
17 logging. According to the plaintiffs, less arbitrary methods exist.  
18 They submit, by way of illustration, that Forest Service employees  
19 could have examined maps and aerial photographs, and, if questions  
20 remained about a particular stretch of road, the employees could have  
21 visited the area. By using such a process, say the plaintiffs, the  
22 Forest Service could have excluded areas that show signs of logging  
23 without also excluding vast swathes of steppe-shrublands.

24 The plaintiffs' criticism of the 300-foot zone is unpersuasive.  
25 To begin with, one must consider the costs associated with the method  
26 of boundary identification proposed by the plaintiffs. It seems

1 likely their method would be more time consuming. The plaintiffs do  
2 not think the burden will be oppressive, but the burden will not fall  
3 on them. It will fall of the Forest Service. The Forest Service is  
4 entitled to great deference in deciding how to allocate its employees'  
5 time.

6 There is a second reason the plaintiffs' criticism is  
7 unpersuasive. As will be recalled, they complain the 300-foot zone  
8 will result in the arbitrary exclusion of steppe-shrublands from  
9 potential wilderness area. The record is otherwise. An environmental  
10 group named Oregon Wild asked the Forest Service to consider  
11 designating a 3,970-acre polygon within the South George project  
12 planning area as potential wilderness area. Oregon Wild submitted a  
13 map that, interestingly, did not exclude land within 300 feet of  
14 roads. (FEIS, Appendix I, Map I-OW-1 (AR-29528).) The Forest Service  
15 examined Oregon Wild's proposal and determined it did not meet the  
16 relevant criteria. The plaintiffs do not allege the Forest Service's  
17 decision was arbitrary. If the area proposed by Oregon Wild did not  
18 meet the relevant criteria, what other area would? In other words, is  
19 there some area within the Project area that would qualify as  
20 potential wilderness area if only the Forest Service included steppe-  
21 shrublands that lie within 300 feet of a road? If there is such an  
22 area, the plaintiffs have not identified it.

### 23 SUMMARY OF ANALYSIS

24 The Forest Service has decided to proceed with the South George  
25 Vegetation and Fuels Management Project. The Project has a number of  
26 components. Timber will be commercially harvested on approximately

1 3,900 acres of land. In addition, the Forest Service will remove  
2 trees that are likely to fall on roads, burn approximately 3,000 acres  
3 of land, and thin approximately 25 acres of forest that is located in  
4 a Riparian Habitat Conservation. The plaintiffs allege the Project  
5 violates both the National Forest Management Act and the National  
6 Environmental Policy Act. The Court has authority, under the  
7 Administrative Procedure Act, to consider the plaintiffs' allegations.  
8 However, review is narrow. *Earth Island Institute*, 697 F.3d at 1014  
9 (internal punctuation and citation omitted). The Court may not enjoin  
10 any part of the Project unless the plaintiffs prove the Forest Service  
11 behaved in a manner that is "arbitrary, capricious, an abuse of  
12 discretion, or otherwise not in accordance with law[.]" 5 U.S.C. §  
13 706(2) (A) .

#### 14 A. Snag Habitat

15 The plaintiffs allege the Umatilla National Forest Plan  
16 incorporates the 1982 rule at the project level. That being the case,  
17 say the plaintiffs, the Forest Service must demonstrate there is  
18 enough snag habitat in dry upland forest in the Project area in order  
19 to maintain the population of primary cavity excavators. The  
20 plaintiffs argue that, since there are fewer than 3 large snags per  
21 acre, on average, in dry upland forests in the Project area or, for  
22 that matter, across the Umatilla National Forest as a whole, the  
23 Forest Service cannot fulfill its obligation to preserve enough  
24 habitat for primary cavity excavators. The plaintiffs' allegations  
25 are contradicted by the record. First, the Plan does not incorporate  
26 the 1982 rule's viability requirements at the project level. To the



1 contrary, the Plan incorporates them at the national forest planning  
2 level. As a result, the Forest Service may satisfy its obligations  
3 under the National Forest Management Act by demonstrating there is  
4 enough snag habitat in dry upland forest across the Umatilla National  
5 Forest in order to maintain the population of primary cavity  
6 excavators. Second, the plaintiffs have misinterpreted the  
7 significance of the Forest Service's decision to retain three large  
8 snags per acre on the 926 acres of dry upland forest that will be  
9 subject to commercial logging. Retaining three snags per acre will  
10 promote habitat for primary cavity excavators, but the Forest Service  
11 has determined it is unnecessary to have three large snags per acre on  
12 the 926 acres in question in order to maintain the population of  
13 primary cavity excavators. In the opinion of the Forest Service,  
14 there is adequate habitat across the national forest as a whole. The  
15 plaintiffs have failed to establish this determination "is so  
16 implausible that it could not be ascribed to a difference in view or  
17 the product of agency expertise." *Confederated Tribes*, 342 F.3d at  
18 928 (internal citation omitted). Thus, the Forest Service's decision  
19 to harvest timber in dry upland forest is consistent with the Umatilla  
20 National Forest Plan and the National Forest Management Act.

21 B. Tree Removal in a Riparian Habitat Conservation Area

22 The plaintiffs allege the Forest Service's decision to remove  
23 trees from a Riparian Habitat Conservation Area is a form of timber  
24 management. The plaintiffs are incorrect. The Forest Service  
25 designed this part of the project in order to reduce the risk of a  
26 crown fire spreading through the tops of trees that are growing near

1 an unnamed tributary to George Creek. Although the FEIS does not cite  
2 FM-1 by name, a balanced reading of the FEIS reveals that this part of  
3 the project addresses fire/fuels management rather than timber  
4 management. Consequently, the removal of trees along the tributary  
5 should be evaluated under FM-1. The plaintiffs are concerned that  
6 removing trees in the RHCA will expose more of the stream to sunlight  
7 and this will, in turn, lead to an increase in temperature of the  
8 water in the stream. The Forest Service considered this issue and  
9 designed the project in a manner calculated to reduce the risk of an  
10 increase in water temperature. Moreover, the Forest Service assessed  
11 the risk that warmer water will flow from the unnamed stream into  
12 George Creek and injure anadromous fish. The Forest Service  
13 determined that the removal of trees along the tributary is unlikely  
14 to produce a measurable increase in the temperature of George Creek.  
15 The Forest Service's determination is entitled to deference. See,  
16 e.g., *Earth Island Institute*, 697 F.3d at 1020 ("'[b]ecause analysis  
17 of scientific data requires a high level of technical expertise,  
18 courts must defer to the informed discretion of the responsible  
19 federal agencies'" (quoting *Earth Island Inst. v. U.S. Forest Serv.*,  
20 351 F.3d 1291, 1301 (9th Cir.2003))). The plaintiffs have engaged in  
21 a thoughtful critique of the Forest Services' analysis of the relevant  
22 data. Nevertheless, they have failed to demonstrate the Forest  
23 Service's analysis "runs counter to the evidence." *Confederated*  
24 *Tribes*, 342 F.3d at 928 (internal citation omitted). Finally, leaving  
25 the trees in place poses risks of its own. The area in question is  
26 becoming increasingly vulnerable to fire. Undoubtedly, a fire would

1 retard the attainment of Riparian Management Objectives. By contrast,  
2 taking environmentally responsible steps to avoid a fire will help  
3 attain RMOs. It follows that removal of the trees from the RHCA does  
4 not violate either the Eastside Screens or PACFISH, which is to say  
5 removal does not violate the National Forest Management Act.

6 C. Potential Wilderness Areas

7 The plaintiffs allege the Forest Service's decision to exclude  
8 all land that is located within 300 feet of a road from potential  
9 wilderness areas, whether or not the land shows signs of logging, will  
10 result in the arbitrary exclusion of steppe-shrublands from potential  
11 wilderness areas in violation of National Environmental Policy Act.  
12 The plaintiffs think there is a better way to identify the boundaries  
13 of potential wilderness areas. They suggest Forest Service employees  
14 examine maps and, when maps do not provide adequate guidance,  
15 personally inspect the area in question. The plaintiffs' proposal is  
16 not unreasonable. Indeed, if the Forest Service had greater  
17 resources, the Forest Service might adopt it; but, the fact remains  
18 the Forest Service's resources are limited. It must take reasonable  
19 steps to conserve them. Here, the Forest Service relied upon the  
20 Forest Service Handbook. The FSH recommends using semi-permanent  
21 features, such as roads, to establish boundaries. The Forest Service  
22 did that. Consequently, its reliance upon an easy-to-administer rule  
23 of boundary identification was not arbitrary. The 300-foot zone does  
24 not violate NEPA. Nor, contrary to the plaintiffs, did the Forest  
25 Service ignore the presence of steppe-shrublands in the Project area.  
26 They figured significantly in the proposal that Oregon Wild submitted

1 to the Forest Service. As observed earlier, Oregon Wild's proposal  
2 did not exclude land that is located within 300 feet of roads. The  
3 Forest Service considered Oregon Wild's proposal, concluding it did  
4 not satisfy the relevant criteria for potential wilderness area. The  
5 Forest Service's response to Oregon Wild's proposal is characteristic  
6 of its overall approach to potential wilderness area. The Forest  
7 Service took a hard look at the issue. In doing so, it fulfilled its  
8 obligations under NEPA.

9 **IT IS HEREBY ORDERED:**

10 1. The plaintiffs' motion for summary judgment (**ECF No. 22**) is  
11 **denied.**

12 2. The defendant intervenors' motion for summary judgment (**ECF**  
13 **No. 28**) is **granted.**

14 3. The United States Forest Service's motion for summary judgment  
15 (**ECF No. 31**) is **granted.**

16 4. The plaintiffs' complaint is dismissed with prejudice.

17 **IT IS SO ORDERED.** The District Court Executive is hereby  
18 directed to file this order, enter judgment accordingly, furnish  
19 copies to counsel, and close the case.

20 **DATED** this 6th day of January, 2014.

21  
22 s/ Fred Van Sickle  
Fred Van Sickle  
23 Senior United States District Judge  
24  
25  
26